

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

JORGE ALEJANDRO PULIDO  
COLMENERO,

Petitioner

v.

JAMES ROBERTSON, Warden,  
Respondent.

Case No. CV ED 22-1215-DMG (GJS)

**ORDER ACCEPTING FINDINGS  
AND RECOMMENDATIONS OF  
UNITED STATES MAGISTRATE  
JUDGE**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the operative habeas petition (“Petition” [Doc. # 1]), all relevant documents filed and lodged in this action, the Report and Recommendation of United States Magistrate Judge (“Report” [Doc. # 20]), and Petitioner’s Objections to the Report [Doc. # 21]. Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), the Court has conducted a *de novo* review of those portions of the Report to which objections have been stated.

For the reasons stated below, Petitioner’s Objections to the Report do not warrant any change to the Magistrate Judge’s findings and recommendations. Petitioner objects, in relation to Grounds One and Five to Nine, that his right to participate in the selection of his defense was violated under *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018). [Doc. # 21 at 3–4, 6–7.] In *McCoy*, the Supreme Court

1 “h[e]ld that a defendant has the right to insist that counsel refrain from admitting  
 2 guilt, even when counsel’s experienced-based view is that confessing guilt offers the  
 3 defendant the best chance to avoid the death penalty.” 138 S. Ct. at 1505. Petitioner  
 4 argues that, under *McCoy*, his federal rights were violated when his defense counsel  
 5 selected a defense of factual innocence (specifically, third-party culpability) rather  
 6 than mental defect or insufficient evidence. [Doc. # 21 at 3–4, 6–7.] As the Report  
 7 discussed, however, Petitioner has not demonstrated his federal rights were violated  
 8 on this basis. Unlike the defense counsel in *McCoy*, Petitioner’s defense counsel  
 9 never conceded Petitioner’s guilt. [Doc. # 20 at 16.] Moreover, unlike the record in  
 10 *McCoy*, the record here contains “no indication that Petitioner voiced an opposition  
 11 to the third-party culpability defense presented at trial.” *Id.* Indeed, it appears that  
 12 Petitioner wanted to “present a full-on-I-am-one-hundred-percent-innocent-of-this-  
 13 crime defense at trial.” [Doc. # 15-6 at 8.]

14 Petitioner objects, in relation to Ground Three, that his defense counsel was  
 15 ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), for failing to  
 16 present a mental health defense. [Doc. # 21 at 3, 6.] But as the Report found,  
 17 Petitioner “fails to offer any evidence that a defense based on mental illness would  
 18 have resulted in a more favorable outcome at trial.” [Doc. # 20 at 19–20.] The  
 19 record contains no opinion from a mental health expert or any other evidence  
 20 suggesting that such a defense would have changed the outcome of the trial. Thus,  
 21 Petitioner’s claim that such a defense would have led to a different trial outcome is  
 22 “speculative” and “insufficient to establish prejudice” under *Strickland*. *Gallegos v.*  
 23 *Ryan*, 820 F.3d 1013, 1035 (9th Cir. 2016).

24 Petitioner objects, in relation to Ground Six, that his defense counsel failed to  
 25 subject the prosecutor’s case to meaningful adversarial testing under *United States v.*  
 26 *Cronic*, 466 U.S. 648 (1984). [Doc. # 21 at 5.] As the Report discussed, however,  
 27 Petitioner’s claim is not supported by the record, which shows that defense counsel  
 28 took several steps to challenge the prosecutor’s case throughout the trial, particularly

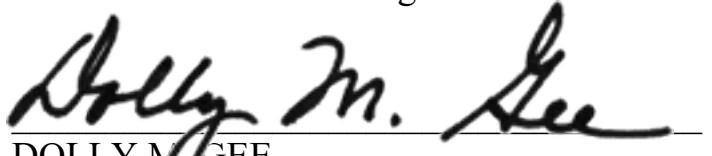
1 with a defense of third-party culpability. [Doc. # 20 at 17; *see also* Doc. # 15-3 at  
2 237–46, Doc. # 15-7 at 42–72, 77–78, 132–51, 158–59, 174–77, Doc. # 15-8 at 80–  
3 97.] Petitioner objects, in relation to Ground Two, that the trial court violated his  
4 federal rights by denying his motion for substitution of counsel, which Petitioner  
5 had brought on the basis of an “irreconcilable conflict.” [Doc. # 21 at 7.] As a  
6 threshold matter, habeas relief is precluded for this claim because of the absence of  
7 clearly established federal law. The Supreme Court “has never held that an  
8 irreconcilable conflict with one’s attorney constitutes a *per se* denial of the right to  
9 effective counsel.” *Carter v. Davis*, 946 F.3d 489, 508 (9th Cir. 2019) (*per curiam*).  
10 Moreover, as discussed in the Report, Petitioner failed to show an irreconcilable  
11 conflict with his defense counsel, rather than merely a dissatisfaction or  
12 disagreement over trial tactics. [Doc. # 20 at 24.]

13 Petitioner objects, in relation to Ground Two, that due to a lack of  
14 communication with defense counsel, Petitioner was unaware of a plea offer of 15  
15 years to life. [Doc. # 21 at 7.] The record shows, to the contrary, that Petitioner was  
16 aware of the plea offer and declined to accept it. [Doc. # 15-6 at 12.]

17 Petitioner objects that the trial court erred in failing to instruct the jury on the  
18 lesser included offense of voluntary manslaughter. [Doc. # 21 at 8.] This claim is  
19 not cognizable on federal habeas review because it fails to present a federal  
20 question. *Solis v. Garcia*, 219 F.3d 922, 929 (9th Cir. 2000) (*per curiam*).

21 Having completed its review, the Court accepts the findings and  
22 recommendations set forth in the Report. Accordingly, **IT IS ORDERED** that the  
23 Petition is DENIED. Judgment shall be entered dismissing this action with  
24 prejudice.

25 DATED: April 22, 2024

  
DOLLY M. GEE  
CHIEF UNITED STATES DISTRICT JUDGE